

Some Thoughts on CCI-III: Advocating Advocacy by CCI

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The Competition Commission of India (CCI) has the mandate under the Competition Act, 2002 (the Act) to carry out the advocacy of competition law along with its duties of enforcing the provisions of the competition law. No doubt, the CCI has been carrying on advocacy initiatives from the time the CCI was established in October, 2003 but there has been a systemic consolidation in these initiatives for a better and more methodical impact. This is a heartening development. Some of the initiatives included in this write up were commenced earlier. However, in conjunction with the signing of MOUs by with professional institutions, a lasting structure has come into existence making the entire advocacy efforts more focussed and effective.

This is the thrust of this article by the author, who himself had been a part of these initiatives from 2006 till 2011 while handling different major responsibilities related with the establishment of competition law in India as a part of the original core team of CCI.

Indian competition law, as contained in Competition Act, 2002 (“Act”), is one of those competition legislations, among competition law legislations of different countries, which gives a positive mandate to the competition agency of the country, Competition Commission of India (“Commission” or “CCI”) to reach out to the stakeholders for spreading awareness about the existence of competition law amongst them as well as train the appropriate persons in the universe of stake holders in competition law. This is contained in the provision of Section 49 of the Act. For a ready reference Section 49 of the Act is being extracted below.

“Section 49 in the Competition Act, 2002
49 Competition advocacy.— (1) The Central Government may, in formulating a policy on competition (including review of laws related to competition) or on any other matter, and a State Government may, in formulating a policy on competition or on any other matter, as the case may be, make a reference to the Commission for its opinion on possible effect of such policy on competition and on the receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, or the State

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Government, as the case may be, which may thereafter take further action as it deems fit.

(2) The opinion given by the Commission under sub-section (1) shall not be binding upon the Central Government 21 [or the State Government, as the case may be,] in formulating such policy.

(3) The Commission shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.”

As we can see from the above provisions of Section 49 of the Act, the Act envisages spreading of awareness and advocacy on competition law and its implications to Central Government, State Governments, all the stakeholders and also train them. To this extent, the Act enacted in January 2003, as a sequel to the report submitted by the High Level Committee on Competition Policy & Law (popularly known as Raghavan Committee as it was headed by Mr. S V S Raghavan), incorporated advocacy as an important limb of competition law by insertion of Section 49 in the Act. Thus the Act not only gives the powers of enforcement of the competition law to the competition agency but also gives the responsibility of training the stakeholders as well as spreading awareness about the existence of competition law and its provisions. This is quite a unique proposition.

It also highlights the fact that the legislature was aware of the fact that India, suffering from the baggage of the past, is suffering from wide scale prevalence of anti-competitive practices in different sectors of the economy. Just to start commencement of enforcement without any awareness may create very unpleasant situations. Therefore, perhaps, the framers of the law could anticipate that enforcement without awareness may not be the right approach in a country coming out of the shadows of a protected economy for a long period of time and sheltered methods of doing business.

If we look at the history of competition law in India, we notice that though the competition law was enacted in January 2003 and established in October, 2003 but it could not become functional till as late as May 20, 2009. At the time of establishment of the Commission, the litigious journey began even before the Chairman designate could enter office of the Commission. A Member had already entered office before that after establishment of the CCI. In terms of the earlier scheme of things on competition law, prior to the amendment of September, 2007, the Commission was to consist of one Chairperson and not less than two but not more than 10 other Members to be appointed by the Central Government. The earlier section 8, prior to amendment, is being extracted below for a ready reference :

“Composition of Commission

8 (1) The Commission shall consist of a Chairperson and not less than two and not more than ten other Members to be appointed by the Central Government:

Provided that the Central Government shall appoint the Chairperson and a Member during the first year of the establishment of the Commission.

(2) The Chairperson and every other Member shall be a person of ability, integrity and standing and who has been, or is

qualified to be a judge of a High Court, or, has special knowledge of, and professional experience of not less than fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which, in the opinion of the Central Government may be useful to the Commission.

(3) The Chairperson and other Members shall be whole-time Members."

Therefore, for Commission to be functional there was a necessity of the Chairperson and at least one minimum Member to be in office in first year and a minimum of two Members after the first year. However, this could not happen and the Commission was beset with legal problems questioning its very existence. This happened on account of challenge to the law itself and the consequent delay in enforcement of competition law in India. This resulted in a situation wherein only one Member who had entered the office before the commencement of litigation continued to be in office and it remained a one Member body without being a full Commission in absence of the Chairman entering office and giving the Commission a statutory character.

This was the time when the entire Commission was involved in essentially preparatory and formative work and preparations for establishing the functional Commission whenever that was to happen. One of the sections notified by the Government which was operational at that time was the Section 49 of the Act. Therefore, although the enforcement provisions of the Act were not in operation but section 49 of the Act was notified and was being enforced. This gave the CCI enough authority to carry on the advocacy initiatives to the extent it desired. It was in this background that the Commission came up with the advocacy booklets on various aspects of competition law such

as cartels, bid rigging, combinations, competition compliance, abuse of dominant position, how to file information, frequently asked questions etc. All these advocacy literature along with a copy of Act used to be distributed amongst various advocacy seminars/workshops/conference across the country .

In this series, the CCI organised workshops, seminars, conferences involving judges of different High Courts such as for Punjab and Haryana in Chandigarh, Orissa High Court in Cuttack, , Kerala, High Court in Cochin and many other such places. In addition, the Commission also started commissioning various market studies in different sectors of the economy such as air transport sector, steel & coal, telecom etc. All those market research studies were placed on website of the Commission. Further the Commission also constituted Committees of Experts. There was one Advisory Committee on drafting of Regulations and another Advisory Committee for Market Studies. These advisory committees used to meet from time to time on the aspects assigned to them. They had people of eminence who had a background in law and/or economics and had substantial experience in the fields. It may be noteworthy to mention that Mr Urjit Patel present RBI Governor, who was an economist, as well as Mr. Subir Gokarn another economist of eminence, former Dy. Governor, RBI and Dr. Vijay Kehlkar who had been consulted by the Government from time to time on matters of taxation and economics were associated and a part of some of these advisory committees and they helped the Commission examine research studies proposals received from various sources as well as acting as a sounding boards on framing of regulations.

The Commission also approached various educational institutions

intimating them about the existence of competition law and the competition agency and, accordingly, encouraged them to have competition law as one of the subjects in their curriculum either in the graduation level or the under graduate level. The response from the various educational institutions was mixed. Some of them adopted the subject of competition law at master's level and some introduced it either as an elective or as a part of curriculum of Corporate or Business Laws. Nonetheless, it was taken note of by many institutions. It is heartening to note that it could be said that it was because of such efforts that some of the prominent institutions are now also conducting Masters Course in Competition Law such as National Law School University of Delhi and some others. All these advocacy efforts were done on a regular basis. However, if we think that there was some structure which had a recurring mechanism, it was missing. Thus though advocacy was producing quite good results but a streamlined mechanism ensuring continuity and certainty was yet to come into existence. Or we can say that there was room for evolving a method in the madness.

If we look at the advocacy initiatives of CCI in recent past, under the present leadership under Chairman Mr. D K Sikhri and the new advocacy team, we notice that a number of well structured initiatives have been taken. Some of them are being enumerated as under:

- To begin with the Commission has entered into Memorandum of Understandings (MOUs) with other statutory organizations for conducting Workshops, Conferences and Seminars on a regular interval every year. This makes these advocacy Workshops, Conference and Seminars rolling events which would continue to be held during the life time of the MOUs irrespective of the other

engagements of the persons involved in these matters. Once a calendar of events has been firmed up in the beginning of the year, it would have a momentum and continuity. Thus this would bring regularity, certainty, definiteness and continuity. In this series, the Commission has entered into MOUs with the following stakeholders:

- (i) MOU with the Institute of Chartered Accountants of India (ICAI). To make these advocacy event more meaningful ICAI has agreed providing earning of Continuing Education Programme (CEP) credit points to the members of ICAI. This will make these events quite an attractive proposition for the members to attend the event
 - (ii) MOU with Institute of Company Secretaries of India (ICSI).
- CCI has also entered into MOU with National Law School University of Delhi for various events and workshops on competition law and competition assessment. Last such event was held 18/10/2016.
 - Distinguished visitors knowledge sharing series -The CCI keeps inviting, on a regular intervals, distinguish visitors for giving talk to its people this helps in enhancement of their knowledge and exposure of competition law enforcement worldwide.
 - Knowledge partnerships initiatives with various institutions
 - A competition compliance manual has been drafted by the Commission and has been sent to Competition Law Bar Association (CLBA) for its inputs. After receiving appropriate inputs it may be placed on the website of the Commission any time.

- The Commission also has put in place a competition impact mechanism and for this it has empanelled a number of institutions for doing this job.
- The CCI has also started Government advocacy initiatives in partnership with National Institute of Financial Management (NIFM). Under this partnership, some 40 programmes were to be organised in F.Y. 2016-17 out of which 28 events has already been held.

This makes an annual calendar of events which have to go on in a systematic manner irrespective of who is heading advocacy division in the Commission. What requires to be lauded and commended is the fact that with the above rolling out of initiatives, the present team in the CCI in charge of advocacy under the leadership of the Chairman Mr. D K Sikri has been able to bring a much needed method in the madness. Instead of advocacy measures continuing in an ad-hoc manner, by streamlining of various initiatives and giving them a shape under a structure brings in regularity and certainty for advocacy events to be carried out across the country. The Commission has done a very commendable job in this direction. This would go a long way in creating awareness about the subject and will also motivate more potential stakeholders to bring the violations of competition law to the knowledge of the Commission instead of silently suffering it alone believing that, perhaps, this was the way business was done. There is a feeling and perception amongst the weak business partners that if they try to report the abusive conduct of a dominant business partners, it might harm their prospects in business in view of the ongoing business relationships. As their financial position is not significant, they also fear that the dominant abusive party may bleed them to death by way of vengeance. Such fears are preventing the

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actual victims of all anti-competitive conducts such as abuse of dominant position or anti-competitive agreements to come before the Commission. Removal of this fear from the minds of abused victims of a dominant position remains one of the prime aims of the Commission and if it succeeds in the same it would have half achieved in its objectives.

Enough has been said and written about the other issues which relate to the procedure of drafting of orders for which considerable flak has come from the first appellate body COMPAT in view of not adhering to principal of natural justice and the judicial decorum and many other aspects. Bringing in confidence of all the stakeholders and displaying to them – both by content and conduct- that their coming forth with the knowledge of abusive conduct would not result in any harm to them and, yes, that the Commission will act as an angel guardian of their interests would go a long way in restoring the faith of the stakeholders. They feel exposed due to listing of names by the Commission on its website when the information comes or revealing the details to the public. If such things are not there, it would reduce the fear of retribution. Other than giving the Commission extremely important valuable cases, these measures would not result in any adverse outcome. When we look at the commencement of the

enforcement in different other countries, the number of complaints before the CCI, called information, is really miniscule looking at the size of the economy. This is the contradiction in terms. The countries which are having much less agency staff as well as much small size of economy are having a large number of matters before them. Not only the number of information before the Commission is less but it is not growing with years as would have been expected. On the contrary, if somebody looks at the website of CCI, it may effectively even be on the decline. That is not a good sign.

It may mean either the erosion of confidence of the stakeholders in the agency or the feeling that not going to agency is better than going to the agency. Partly, it represents the Indians style to suffer in silence and do not follow the remedial measures. The Commission has to do an introspection as to how the fear element from the minds of various stakeholders can be removed so that they have the courage to approach the

Commission and intimate CCI about anti competitive conduct of different enterprises. If we have a look at the kinds of the cases coming before the Commission they, generally, appear to be instances of motivated business rivalry rather than genuine information. Therefore, the Commission should make efforts to bring cheers to the faces of real oppressed in relationship where either of the enterprises in a business relationship is suffering from or indulging in anti competitive conduct. The cases coming out to the Commission as a result of business rivalry is not a good sign.

It is hoped that other divisions of the Commission would also take a leaf out of the work of the advocacy division and do well to energise and invigorate other divisions as well so that competition agency does an excellent work and is recognised internationally for its innovative methods as it is being lauded for advocacy efforts amongst comity of competition agencies.